

APPEAL NO. 032731
FILED DECEMBER 8, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 16, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable occupational disease injury on _____; that the respondent (carrier) waived the right to contest compensability of the claimed injury by not contesting the injury in accordance with Section 409.021; and that the claimant did not have disability as a result of the claimed injury. The claimant appeals the compensability and disability determinations. The appeal file contains no response from the carrier. The determination that the carrier waived the right to contest compensability of the claimed injury has not been not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part.

It is undisputed that the claimant was employed at a scrap metal plant for over 5 years. Prior to the injury in question, the claimant sustained a work-related injury on (prior date of injury), when he was struck in the head by a metal band. The evidence reflects that, with regard to the (prior date of injury) injury, the claimant reached maximum medical improvement on March 13, 2003, with a 14% impairment rating. The claimant testified that he continued to suffer from headaches and other unexplained maladies, both physical and emotional, and starting in August 2001, he began treating with Dr. C, who referred the claimant to Dr. K and Dr. E. The claimant was tested for toxic substances and it was confirmed that his blood levels for lead were "abnormally high." On October 15, 2001, Dr. K referred the claimant back to Dr. C for treatment for lead poisoning, but Dr. C had previously withdrawn as the claimant's treating physician. The claimant was examined by Dr. U sometime in 2002. In a letter dated October 31, 2002, Dr. U agrees with Dr. K that the claimant's headaches are caused by lead poisoning. In a letter to the claimant's attorney, dated June 16, 2003, Dr. K notes that the claimant had "40 micrograms of lead in blood" on _____, and "31 micrograms in blood" on October 3, 2001. Dr. K explained that the normal level of lead is not more than 25 micrograms, but usually less than 10 micrograms and that high levels of lead may result in brain damage even after the lead levels return to normal. On January 20, 2003, the claimant's blood lead level tested within normal limits. However, on December 20, 2002, Dr. Cr conducted an independent medical examination and opined that the claimant's headaches and emotional difficulties resulted from the injury sustained on (prior date of injury), and not from lead poisoning.

The hearing officer considered the conflicting evidence and determined that the claimant did not sustain an occupational disease injury while in the course and scope of his employment on _____, and that he did not have disability as a result of the

claimed injury. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Nothing in our review of the record indicates that the hearing officer's findings of fact relating to compensability or the determination that the claimant did not have disability are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Irrespective of the waiver determination, the hearing officer, relying on Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), found that the claimant's injury is not otherwise compensable. In Williamson, the court held that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law. We have interpreted Williamson to mean that a carrier's failure to timely dispute does not create an injury only when there is no injury. However, if the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when the carrier waives the right to dispute compensability. See Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000, and Texas Workers' Compensation Commission Appeal No. 981640, decided September 2, 1998.

In making the determination that the claimant did not sustain a compensable injury as a result of the carrier's waiver of the right to contest compensability, the hearing officer found that the "medical evidence is insufficient to establish, to a reasonable degree of probability, that the [c]laimant's exposure to lead caused damage or harm to the physical structure of his body or that he suffered from lead intoxication." However, as previously noted, the evidence reflects that the claimant was diagnosed with lead intoxication, which Dr. K noted could result in headaches, as complained-of by the claimant. We cannot agree that lead intoxication is not an injury as defined in Section 401.011(26). For these reasons, Finding of Fact No. 4 and Conclusion of Law No. 3 are reversed and a new decision is rendered that the claimant has suffered damage or harm to the physical structure of his body and that the claimant's injury became compensable as a matter of law due to the carrier's waiver of the right to dispute compensability. The hearing officer's disability determination is affirmed as it was not premised on the fact that the claimant's injury was not compensable; rather the hearing officer noted that the claimant was never taken off work for the claimed injury and that the symptoms complained-of by the claimant resulting from the injury in question, are the same as those related to the (prior date of injury) injury.

The true corporate name of the insurance carrier is **WAUSAU UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge